Borneo Marble Ltd v Datuk Yong Teck Lee & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS S-02(NCVC)(W)-107–01 OF 2018 AND S-02(NCVC)(W)-149–01 OF 2018
ABDUL RAHMAN SEBLI, MARY LIM AND HASNAH HASHIM JJCA
2 OCTOBER 2019

Contract — Claims — Claim for money lent — Appellant lent money to respondents — Appellant entered into agreement with company owned by respondent — Appellant deposited funds to respondents — Whether funds deposited constituted as loan or personal and voluntary gift — Whether cash monies handed over to respondents would be repaid — Whether the claim for the money lent statute-barred — Sabah Limitation Ordinance item 39, Schedule

There were two appeals in the present case. Borneo Marble Ltd was the appellant in Civil Appeal No S-02(NCVC)(W)-107–01 of 2018 ('the first appeal') whilst Datuk Yong Teck Lee and Datin Stella Kong Ying Kiun were the respondents respectively. In Civil Appeal No S-02(NCVC)(W)-149–01 of 2018 ('the second appeal'), it was the reverse. The appellant's appeal in the first appeal was against the part of the judgment dismissing the rest of its claim and allowing only a sum of HK$100,000. It was argued that the appellant was entitled to the whole sum claim of HK$3,289,994.97. The respondent's appeal on the other hand was against that part of the judgment allowing the appellant's claim in part of HK$100,000. The respondents' contention was that the appellant was entitled to nothing. In 2006, the appellant entered into a five year agreement with a company called Orient Paramount Sdn Bhd ('OPSB') whereby the appellant was appointed as the sole distributor of OPSB's product. Datuk Yong's contention was that the appellant was a company controlled by his elder brother, Paul Yong who at the trial was joined as a third party with the respondents. He did not enter appearance, nor did he file a defence to the third party notice. Judgment in default was accordingly entered against him. The appellant's claim against the respondents in the present suit was in two parts. According to the appellant, it had deposited by telegraphic transfer the funds into the respondent's joint account at HSBC UK. The second part was that it had handed over the funds in cash to Datuk Yong in Hong Kong or China. It was the appellant's contention that both funds given to the respondents was upon the agreement between the parties that the funds or monies would be repaid when demanded by the appellant. The respondents pleaded the funds were personal and voluntary gifts from Paul Yong, whom they claimed was the person in control of the appellant. The appellant too had amended its pleadings in that it had originally pleaded that

the advances were monies lent to the respondents and applied to amend the term lent to the term deposited with. It was submitted by the respondents that the amendment by the appellant was designed to escape the limitation period of three years laid down in item 39 of the Schedule to Limitation Ordinance of Sabah ('the SLO').

Held, allowing the appeals in part:

(1) The amendments applied by both parties had been allowed by the learned judge and both sides did not appeal against the decisions, which means they accepted the decisions. Once the amendments were allowed, the original pleaded facts must be disregarded by the court, as if they were never pleaded. To hold otherwise would be to defeat the whole purpose of the amendments. The case must be decided strictly on the amended pleadings and not on pleaded facts before the amendments were allowed (see paras 21–22).

(2) It was a clear finding by the learned judge that there in fact existed an agreement between the appellant and Datuk Yong that the monies were to be repaid upon demand by the appellant and that the purpose of the advances was to maintain the business relationship between the companies owned by Datuk Yong. The finding of fact undermined the whole substratum of the respondent's pleaded defence. The respondents could have appealed against the finding but they did not. Having decided not to appeal against the finding, they cannot now be heard to say that the finding was wrong. The proved fact was that the funds deposited by telegraphic transfer were to be paid by Datuk Yong upon demand by the appellant as agreed by the parties (see paras 27–29).

(3) In respect of the cash monies, the appellant failed to prove that the rest of the cash handovers on the balance of probabilities (see para 30).

(4) The operative words in item 41 were money lent whereas the operative words in item 42 were money deposited. For money lent under item 41, the three year limitation period begins to run from the time the loan was made whereas under item 42, the three years limitation period for the money deposited begins to run where the demand for payment was actually made. The transfer of telegraphic transfer funds fell under item 42 and not item 41. As such, the appellant's claim was not statute-barred as the limitation period only began to run upon actual demand for payment by the appellant, which was in 2014 (see paras 35–36 & 44).

(5) Whether the transfer was a loan, an advance or a deposit was not determined by how the parties described the transfer. A deposit could be a loan with the key distinguishing factor was when the funds repaid, whether forthwith without actual demand with the transferee had to seek

out the transferor or only upon actual demand. The trial judge had made a finding of fact that the monies were not personal and voluntary gifts but they were to be repaid when demanded, which was not challenged by way of an appeal. In any event, it was not the respondents' case that the finding was perverse or was plainly wrong, in the sense that no reasonable tribunal properly appraised of the facts and the law would come to the finding that the learned trial judge arrived at. The trial judge was perfectly entitled to come to such finding of fact (see paras 45–46 & 50–51).

[Bahasa Malaysia summary

Wujud dua rayuan dalam kes ini. Borneo Marble Ltd merupakan perayu dalam Rayuan Sivil No S-02(NCVC)(W)-107–01 Tahun 2018 ('rayuan pertama') manakala Datuk Yong Teck Lee dan Datin Stella Kong Ying Kuin merupakan responden. Dalam Rayuan Sivil No S-02(NCVC)(W)-149–01 Tahun 2018 ('rayuan kedua'), ianya merupakan sebaliknya. Rayuan perayu dalam rayuan pertama merupakan terhadap bahagian penghakiman yang mengetepikan keseluruhan tuntutannya dan hanya membenarkan sejumlah HK$100,000. Ianya dihujahkan bahawa perayu berhak kepada keseluruhan jumlah tuntutan iaitu HK$3,289,994.97. Rayuan responden sebaliknya terhadap bahagian penghakiman yang membenarkan sebahagian tuntutan perayu HK$100,000. Hujahan responden adalah bahawa perayu tidak berhak keatas apa-apa. Pada tahun 2006, perayu telah memasukki satu perjanjian lima tahun dengan satu syarikat iaitu Orient Paramount Sdn Bhd ('OPSB') yang mana perayu telah dilantik sebagai pengedar tunggal produk OPSB. Adalah menjadi hujahan Datuk Yong bahawa perayu merupakan syarikat yang dikawal oleh abangnya, Paul Young yang sewaktu perbicaraan telah digabung sebagai pihak ketiga dengan responden-responden. Dia tidak memasukkan kehadiran, ataupun memfailkan pembelaan kepada notis pihak ketiga tersebut. Penghakiman ingkar telah dimasukkan terhadapnya. Menurut perayu, beliau telah mendepositkan melalui pemindahan telegrafik, wang kedalam akaun bersama milik responden di HSBC UK. Bahagian kedua adalah ianya telah menyerahkan wang dalam bentuk tunai kepada Datuk Yong di Hong Kong atau China. Ianya merupakan hujahan perayu bahawa kedua-dua dana yang diberikan kepada responden adalah berdasarkan persetujuan antara pihak-pihak bahawa dana atau wang tersebut akan dibayar semula apabila dituntut oleh perayu. Responden memplid bahawa dana tersebut merupakan hadiah peribadi dan sukarela daripada Paul Young, yang mana mereka mengatakan adalah individu yang mempunyai kawalan terhadap perayu. Perayu juga telah meminda plidingnya yang mana asalnya ianya diplid bahawa pendahuluan tersebut adalah wang yang dipinjam kepada responden dan digunakan untuk meminda terma pinjam kepada terma mendepositkan dengan. Ianya dihujahkan oleh responden bahawa pindaan oleh perayu direka untuk mengelakkan tempoh had masa tiga tahun yang dinyatakan dalam item 39 kepada Jadual kepada Ordinan Had Masa Sabah ('Ordinan').

Diputuskan, membenarkan sebahagian rayuan:

(1) Pindaan yang digunakan oleh kedua-dua pihak telah dibenarkan oleh hakim dan kedua-dua pihak tidak merayu terhadap keputusan, yang bermaksud mereka menerima keputusan tersebut. Selepas sahaja pindaan tersebut dibenarkan, fakta asal yang diplid hendaklah diketepikan oleh mahkamah ini, seakan-akan ianya tidak pernah diplid. Untuk memutuskan sebaliknya akan mengalahkan tujuan utama pindaan tersebut. Kes ini hendaklah diputuskan berdasarkan pliding terpinda dan bukannya fakta yang diplid sebelum pindaan dibenarkan (lihat perenggan 21–22).

(2) Adalah merupakan dapatan jelas oleh hakim bahawa ianya wujud perjanjian antara perayu dan Datuk Yong bahawa wang perlu dibayar semula atas tuntutan perayu dan tujuan untuk pendahuluan tersebut untuk meneruskan hubungan perniagaan dengan syarikat yang dimiliki oleh Datuk Yong. Dapatan fakta telah melemahkan asas pembelaan yang diplid oleh responden. Responden boleh merayu terhadap dapatan tersebut tetapi mereka tidak. Setelah membuat keputusan untuk tidak merayu terhadap dapatan tersebut, mereka kini tidak boleh menyatakan bahawa dapatan itu salah. Fakta yang dibuktikan adalah bahawa dana yang didepositkan melalui pindahan telegrafik hendaklah dibayar kepada Datuk Yong atas tuntutan perayu sepertimana dipersetujui oleh pihak-pihak (lihat perenggan 27–29).

(3) Berkenaan dengan wang tunai, perayu gagal untuk membuktikan wang tunai yang diserahkan atas imbangan kebarangkalian (lihat perenggan 30).

(4) Perkataan dalam item 41 adalah yang mana wang yang dipinjam, manakala perkatan dalam item 42 adalah wang yang didepositkan. Untuk wang yang dipinjam di bawah item 41, had masa tiga tahun bermula pada masa pinjaman tersebut dibuat manakala di bawah item 42, tempoh had masa untuk wang yang didepositkan bermula apabila tuntutan untuk pinjaman tersebut dibuat. Pemindahan dana melalui pindahan telegrafik jatuh di bawah item 42 dan bukannya item 41. Oleh itu, tuntutan perayu tidak dihadkan oleh undang-undang memandangkan tempoh had masa hanya bermula atas tuntutan pembayaran oleh perayu yang berlaku pada tahun 2014 (lihat perenggan 35–36 & 44).

(5) Sama ada pindahan tersebut merupakan pinjaman, pendahuluan, atau deposit tidak diputuskan oleh bagaimana pihak-pihak menggambarkan pindahan tersebut. Satu deposit boleh menjadi satu pinjaman apabila faktor utama yang membezakan adalah apabila dana tersebut dibayar semula, sama ada dari itu tanpa tuntutan sebenar yang mana penerima pindahan mendapatkannya daripada pemindah atau hanya atas tuntutan

sebenar. Hakim bicara membuat dapatan fakta bahawa wang tersebut bukannya hadiah peribadi atau sukarela tetapi ianya perlu dibayar apabila di tuntut, yang tidak dicabar melalui satu rayuan. Dalam apa keadaan sekalipun, ianya bukan menjadi kes responden bahawa dapatan tersebut adalah songsang atau dengan jelas salah, dalam keadaan tersebut tiada tribunal yang munasabah setelah meneliti fakta dan undang-undang akan sampai kepada dapatan yang hakim bicara tersebut telah sampai. Hakim bicara berhak untuk membuat dapatan fakta sedemikian rupa (lihat perenggan 45–46 & 50–51).]

Notes

For cases on claim for money lent, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4465–4466.

Cases referred to

Jagannath v Ram Dularey AIR 1956 All 63 (refd)
Md Akbar Khan v Attar Singh AIR 1936 PC 171 (B), PC (consd)
Suleman Haji Ahmed Umer v Haji Abdulla Haji Rahimtulla AIR 1940 PC 132 (C), PC (refd)
Syndicate Bank v Channaveerappa Beleri & Ors AIR 2006 SC 1875, SC (refd)

Legislation referred to

Limitation Act 1963 [IND] arts 21, 22, 59, 60
Sabah Limitation Ordinance (Cap 72) Schedule, items 39, 41, 42

Alex Siew (Alex Siew & Co) for the appellant.
Jeyan TM Marimuttu (J Marimuttu & Partners) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] There were two appeals before us. Borneo Marble Ltd ('Borneo Marble') was the appellant in Civil Appeal No S-02(NCVC)(W)-107–01 of 2018 whilst Datuk Yong Teck Lee ('Datuk Yong') and Datin Stella Kong Yin Kiun ('Datin Stella') were the respondents. In Civil Appeal No S-02(NCVC)(W)-149–01 of 2018, it was the reverse. Datuk Yong and Datin Stella were the appellants whilst Borneo Marble was the respondent.

[2] Borneo Marble's appeal in Civil Appeal No S-02(NCVC)(W)-107–01 of 2018 was against that part of the judgment dismissing the rest of its claim and allowing only a sum of Hong Kong Dollar $100,000. Its case was that it was entitled to the whole of the sum claimed, which was an aggregate sum of HK$3,289,994.97, and not just the sum of HK$100,000 that the High Court allowed.

[3] Datuk Yong's and Datin Stella's appeal on the other hand was against that part of the judgment allowing Borneo Marble's claim in part in the sum of HK$100,000. Their contention was that Borneo Marble was entitled to nothing.

[4] After hearing arguments by both sides, we allowed Borneo Marble's appeal but only to the extent of HK$1,261,280 with interest at the rate of 5%pa from the date of judgment to the date of full realisation. We made no order as to costs.

[5] As for Datuk Yong's and Datin Stella's appeal, we also allowed their appeal. We set aside the award of HK$100,000 in favour of Borneo Marble as it was conceded by learned counsel in the course of argument that Borneo Marble's failure to call Paul Yong as a witness had left a gap in its claim against Datuk Yong and Datin Stella.

[6] Consequently Borneo Marble's claim for the cash monies, including the HK$100,000 that the High Court awarded was not proved. Learned counsel then focused his argument on Borneo Marble's claim for the TT funds in the sum of HK$1,261,280 which, as we mentioned, we allowed. We now provide the grounds of our decision.

[7] The background facts had been laid out, accurately in our view, by learned counsel for Borneo Marble and they are as follows. The first respondent Datuk Yong is a former Chief Minister of Sabah whilst the second respondent Datin Stella is his wife.

[8] In 2006, Borneo Marble entered into a five year agreement with a company called Orient Paramount Sdn Bhd ('OPSB') whereby Borneo Marble was appointed the sole distributor of OPSB's products (marble slabs and tiles). There was no dispute that OPSB was a company controlled by Datuk Yong.

[9] Datuk Yong's contention was that Borneo Marble was a company that was controlled by his elder brother, Paul Yong who at the trial was joined as a third party by Datuk Yong and Datin Stella. He did not enter appearance, nor did he file any defence to the third party notice. Judgment in default was accordingly entered against him.

[10] In 2011, the distributorship agreement between Borneo Marble and OPSB was renewed for a further five years. By 2014 however, the relationship between the parties had turned sour.

[11] In 2015, Borneo Marble filed a law suit against OPSB, claiming OPSB

owed Borneo Marble various monies ('the corporate law suit'). The corporate law suit proceeded to trial at the conclusion of which judgment was entered in favour of Borneo Marble. Concurrent with the filing of the corporate law suit, Borneo Marble filed the present suit against Datuk Yong and Datin Stella.

[12] Borneo Marble's claim against Datuk Yong and Datin Stella in the present suit was in two parts. According to Borneo Marble, it had deposited by telegraphic transfer the following funds into Datuk Yong's and Datin Stella's joint account at HSBC UK ('the TT funds') as follows:

Date	Amount (Hong Kong Dollar)
26 May 2006	645,000
18 May 2010	72,480
29 December 2010	108,180
6 July 2011	62,450
30 December 2011	123,000
8 February 2012	61,860
27 August 2012	75,000
14 September 2012	113,310
	HK$1,261,280

[13] This was the first part of Borneo Marble's claim, which was wholly dismissed by the learned trial judge. The second part was that it had handed over the following funds in cash to Datuk Yong in Hong Kong or China ('the cash monies'):

Date	Amount
13 August 2006	30,000.00
15 August 2006	178,650.00
4 October 2006	112,089.17
28 December 2006	123,590.00
19 April 2007	256,844.00
9 July 2007	118,434.60
27 December 2007	262,462.20
5 May 2008	129,106.00
5 January 2009	100,000.00
13 May 2009	80,000.00
5 September 2009	150,000.00
23 January 2010	80,000.00
12 January 2011	100,000.00
25 July 2011	30,000.00
6 January 2012	40,000.00

17 November 2012	100,000.00
21 September 2013	68,139.00
2 December 2013	20,000.00
13 December 2013	49,000.00
	HK$2,028,714.97

[14] It was Borneo Marble's contention that the TT funds and cash monies were deposited or handed over, as the case may be, to Datuk Yong upon an agreement between the parties that the funds/monies would be repaid when demanded by Borneo Marble.

[15] It was pointed out that Datuk Yong and Datin Stella had, in their original defence, flatly denied receiving any of the TT funds or the cash monies. Borneo Marble admitted that it did not have any document signed by Datuk Yong to prove receipt of the cash monies. However, it had copies of bank documents with regard to the TT funds and they were produced as evidence at the trial.

[16] Subsequently, Datuk Yong and Datin Stella amended their defence to admit receipt of the TT funds but pleaded that the funds were 'personal and voluntary gifts' from Paul Yong, whom they claimed was the person in control of Borneo Marble. They denied that the TT funds were meant to be repaid upon demand by Borneo Marble. They also pleaded limitation, in the following terms:

> 4. The Defendants state that the alleged monies purportedly lent or deposited and/or the cause of action pleaded under paragraphs 4 and 5 of the Amended Statement of Claim is time-barred under the Sabah Limitation Ordinance (Cap 72) and did not arise within three (3) years before the commencement of this action. The Defendants will rely on the relevant provisions of the Sabah Limitation Ordinance (Cap 72) at the trial or other interlocutory application in this action.

[17] Datuk Yong's and Datin Stella's response to Borneo Marble's comment on their decision to amend their defence was to return fire with fire. It was pointed out that Borneo Marble too had amended its pleadings in that it had originally pleaded that the advances were monies lent to the defendants, but upon application by Datuk Yong and Datin Stella to strike out certain paragraphs of its claim which were caught by limitation, it applied to amend the term 'lent to' to the term 'deposited with' both in paras 4 and 6 of its statement of claim.

[18] Datuk Yong and Datin Stella lamented that despite their objection, the amendment was allowed by the learned judge. It was submitted that if the monies were purportedly 'lent' to them, as Borneo Marble originally pleaded in

A paras 4 and 6 of its statement of claim, then the purported monies remitted by TT would be caught by item 39 of the Schedule to the Sabah Limitation Ordinance (Cap 72) ('the SLO'), which prescribes a limitation period of three years for Borneo Marble to file its claim, to be measured from the time the monies were lent.

B

[19] It was submitted that the amendment by Borneo Marble to paras 4 and 6 of its statement of claim was designed to escape the provisions of the SLO, more particularly item 39 of the Schedule.

C

[20] The thrust of the argument was that the amendment was to defeat Datuk Yong and Datin Stella's defence that Borneo Marble's claim was statute-barred. This according to Datuk Yong and Datin Stella was highly prejudicial to their case.

D

[21] We shall deal with the issue right away. The parties' attack on each other's amendments to their respective pleadings was disingenious to say the least. The amendments had been allowed by the learned judge and both sides did not appeal against the decisions, which means they accepted the decisions.

E

[22] To now raise the issue would be akin to flogging a dead horse. Once the amendments were allowed, the original pleaded facts must be disregarded by the court, as if they were never pleaded. To hold otherwise would be to defeat the whole purpose of the amendments.

F

[23] It was therefore untenable for Datuk Yong and Datin Stella to advance the following argument, which they did:

> [3] In the original statement of claim, the plaintiff pleaded that it lent various amounts of monies to the defendants which were transmitted via telegraphic transfer. However, before the trial commenced, the plaintiff successfully amended 'loan' to 'deposit' in the statement of claim. The issue of whether the monies of a 'loan' or a 'deposit' is crucial in this case as the claim would be barred by Sabah limitation law if the monies were a 'loan'.

G

H

[24] The same goes to Borneo Marble's reference to Datuk Yong's and Datin Stella's originally pleaded defence that they never received any of the TT funds and cash monies.

I

[25] The case must be decided strictly on the amended pleadings and not on pleaded facts before the amendments were allowed. Indeed, as can be seen from the agreed issues to be tried, they were based on the amended pleadings and not on the original pleadings. The agreed issues were as follows:

1. Whether the monies remitted by TTs were monies from the Plaintiff to the Defendants upon the agreement between the Plaintiff and the Defendants that the monies would be repaid when demanded by the Plaintiff, as the Plaintiff contends, or whether these monies were monies from Paul Yong to the Defendants as a 'personal and voluntary gift', as the Defendants contend.

2. Whether further sums in cash were handed over to the 1st Defendant upon the agreement between the Plaintiff and the 1st defendant that the monies would be repaid when demanded by the Plaintiff, as contended by the Plaintiff but as denied by the 1st Defendant.

3. Whether in any event, the Plaintiff's claims are time-barred, in whole or in part.

[26] At the conclusion of the trial, the learned trial judge found in favour of Borneo Marble in respect of issue No 1 (the TT funds). We reproduce below the learned judge's finding and reasoning (p 18 of the supplementary record of appeal):

> [26] For all the above reasons, it is my finding that the monies in question were not a personal and voluntary gift from Paul Yong to his brother, the first defendant. It is also my finding that monies were transmitted to the account of the defendants *upon an implied agreement that they must be repaid when demanded by the plaintiff*. My reason is that the monies were advances transmitted by the plaintiff in order to maintain a business relationship between the companies owned by the first defendant. As the monies were not an outright gift but were advances that were requested by the first defendant, it is implicit that they must be refunded upon demand. (Emphasis added.)

[27] It was a clear finding by the learned judge that there in fact existed an agreement between Borneo Marble and Datuk Yong that the monies were to be repaid upon demand by Borneo Marble and that the purpose of the advances was to maintain the business relationship between the companies owned by Datuk Yong.

[28] This finding of fact undermined the whole substratum of Datuk Yong's and Datin Stella's pleaded defence (as amended) that the TT funds amounting to HK$1,261,280 was an outright personal gift by Paul Yong to Datuk Yong. Datuk Yong and Datin Stella could have appealed against the finding but they did not.

[29] Having decided not to appeal against the finding, they cannot now be heard to say that the finding was wrong. Thus, the proved fact was that the TT funds were to be repaid by Datuk Yong upon demand by Borneo Marble as agreed by the parties.

[30] In respect of issue No 2 (the cash monies), the learned judge held that apart from the HK$100,000 which was allowed, Borneo Marble failed to prove the rest of the cash handovers on the balance of probabilities.

[31] As for issue No 3 (limitation), the learned judge's view was that Borneo Marble's claim for the TT funds in the sum of HK$1,261,280 was statute-barred, for the following reasons:

> [41] Item 42 refers to money deposited under the agreement that it shall be payable on demand. PW1 never said in his evidence that his company, ie the plaintiff remitted monies to the HCBC UK account of the defendants as deposits under an agreement that it shall be repayable upon demand. In the remittance form for one transaction, ie the sum of HKD645,000 that transferred to the said account on 26 May 2006, the purpose of the remittance is stated as 'work done' ... During cross-examination, PW1 said that it is a 'loan' ...
>
> PW1 told the court that there was an agreement that the defendants would repay the monies upon demand. But he gave no details of the agreement save to say that the monies were advanced upon the request of the first defendant in order to maintain the good business relationship between the plaintiff and the companies owned by the first defendant. He also gave no reason why the plaintiff company that is based in Hong Kong would want to deposit monies with individuals without any written agreement. None of the remittance slips indicate that the payments were deposits. The plaintiff did not exhibit any audited financial statement that shows that the monies were assets of the company in the form of money deposits either. It is also crucial to note that the 'advances' were made at the instance of the first defendant and not at the instance of the payer, ie the plaintiff. This is one of the distinguishing characteristics between a loan and a deposit (see *The Limitation Act 1963* by BB Mitra (22nd Ed). For all the above reasons, on a balance of probabilities, I find that the remittances were advances or loans given to the defendants at the request of the first defendant in order to maintain a business relationship and therefore did not constitute a 'deposit under agreement'.

[32] This finding appears, on the face of it, to be in conflict with His Lordship's earlier finding in para 26 of his grounds of judgment that the monies were to be repaid upon demand by Borneo Marble. To recapitulate, this is what the learned judge had said:

> It is also my finding that monies were transmitted to the account of the defendants upon an implied agreement that they must be repaid when demanded by the plaintiff.

[33] Borneo Marble's main ground of appeal before us was that the learned trial judge erred in law in holding that its claim for the TT funds in the sum of HK$1,261,280 was statute-barred.

[34] What the court had to consider in relation to the issue of limitation was

whether the transactions relating to the TT funds fell under item 41 or under item 42 of the SLO. We reproduce below items 41 and 42 of the SLO:

	Description of suit	Period of limitation	Time from which period begins to run
41.	For money lent under an agreement that it shall be payable on demand	Three years	When the loan is made
42.	For money deposited under an agreement that it shall be payable on demand	Three years	When the demand is made

[35] The operative words in item 41 are 'money lent' whereas the operative words in item 42 are 'money deposited'. Thus, for money lent under item 41, the three year limitation period begins to run from the time the loan is made whereas under item 42 the three year limitation period for the money deposited only begins to run when the demand for payment is actually made.

[36] If the transfers of the TT funds fall under item 41, Borneo Marble's claim would be statute-barred as the limitation period would have begun to run from the date the transfers were made, but if the transfers fall under item 42, ie that it was money deposited under an agreement that it shall be payable on demand, Borneo Marble's claim would not be statute-barred as the limitation period would only begin to run when Borneo Marble made the actual demand for payment.

[37] In this regard, it was not disputed that Borneo Marble made the demand in 2014 and the present suit was commenced in 2015, well within the limitation period if the transfers of the TT funds fall under item 42 of the Schedule.

[38] The SLO is modelled on the Indian Limitation Act 1963, of which arts 59 and 60 of the Schedule to the Act are in pari materia with items 41 and 42 respectively of the Schedule to the SLO. Therefore, cases that emanate from India which deal with arts 59 and 60 of the Indian Limitation Act 1963 are of persuasive authority in dealing with items 41 and 42 of the Schedule to the SLO.

[39] The leading Indian authority on the point is the Privy Council case of *Md Akbar Khan v Attar Singh* AIR 1936 PC 171 (B) where Lord Atkin

delivering the judgment of the judicial committee said at p 172:

> The articles of the Limitation Act which are relevant are:
>
> 59. For money lent under an agreement that it shall be payable on demand: Three years from the time when the loan was made.
>
> 60. For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable: Three years from the time when the demand is made.
>
> To which should be added article 120. Suit for which no period of limitation is provided elsewhere than in this schedule: Six years from the time when the right to sue accrues.
>
> It is therefore necessary to determine whether this was money lent by the plaintiff to the defendants; or whether it was deposited under an agreement that it should be payable on demand ... Was this then a loan or was it a deposit payable on demand? It should be remembered that the two terms are not mutually exclusive. A deposit of money is not confined to a bailment of specific currency to be returned in specie. As in the case of a deposit with a banker it does not necessarily involve the creation of a trust, but may involve only the creation of the relation of debtor and creditor, a loan under conditions. The distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the depositee to seek out the depositor and repay him. He is to keep the money till asked for it. A demand by the depositer would therefore seem to be normal condition of the obligation of the depositee to repay.

[40] *Md Akbar Khan* was followed in another Privy Council case of *Suleman Haji Ahmed Umer v Haji Abdulla Haji Rahimtulla* AIR 1940 PC 132 (C). After quoting the last paragraph of the above passage in *Md Akbar Khan*, the Privy Council went on to say at p 133:

> The trial Court concluded that the respondent handed these moneys to the appellant not as a deposit but as a loan, but founded this decision principally on its inability to accept the evidence of the respondent where in conflict with that of the appellant, and nowhere applied the test laid down in the case just cited, so as to ascertain whether on the admitted facts in the case there was an obligation on the appellant to 'seek out' the respondent and repay him, or whether he was to keep the moneys till the respondent asked for them.

[41] As for the distinction between a loan and a deposit, it was explained in the following terms by the court in *Jagannath v Ram Dularey* AIR 1956 All 63 after citing Lord Atkin's pronouncement in *Md Akbar Khan*:

> It appears to us that the main difference between a loan and a deposit consists in this. If the intention of the person paying the amount is that the person to whom the amount is paid should keep the amount with him and pay it to the person only when he asks for its payment and not otherwise, then it is a deposit. If on the other

hand, the intention is that the amount is to be paid by the payee without the payer asking for its return then it is a loan.

The crucial test is whether it was intended that the amount should remain with the payee indefinitely or not; or this may be put in other words, whether it was intended that the payee was to seek the payer for the payment of the amount paid or whether he was not to seek the payer, and the payer was to demand the amount from the payee before the amount became payable.

If the amount paid is intended to be retained by the payee, so long as a demand for payment is not made, it is obvious that the amount does not become payable unless the demand is made and the period of limitation does not begin to run unless the demand is made and is refused. On the other hand in the case of a loan payable on demand, no demand is necessary and the amount becomes payable forthwith and the period of limitation begins to run as soon as the advance is made.

The word 'demand' in the phrase 'on demand' when used in connection with a loan, does not really mean that the amount becomes payable only when the payment is demanded. It merely means that the loan is not for any fixed term and is payable forthwith. On the other hand, the words 'on demand' when used in connection with a 'deposit really mean what they say, that is that the deposit' is to be paid when it is demanded.

[42] In another Indian case, *Syndicate Bank v Channaveerappa Beleri & Ors* AIR 2006 SC 1875, the Supreme Court of India explained the difference in the meaning of the term 'on demand' in art 21 with art 22 of the Indian Limitation Act 1963:

12. We will examine the meaning of the words 'on demand'. As noticed above, the High Court was of the view that the words 'on demand' in law have a special meaning and when an agreement states that an amount is payable on demand, it implies that it is always payable, that is payable forthwith and a demand is not a condition precedent for the amount to become payable. The meaning attached to the expression 'on demand' as 'always payable' or 'payable forthwith without demand' is not one of universal application. The said meaning applies only in certain circumstances. The said meaning is normally applied to promissory notes or bills of exchange payable on demand. We may refer to Articles 21 and 22 in this behalf. Article 21 provides that for the money lent under an agreement that it shall be payable on demand, the period of limitation (3 years) begins to run when the loan is made. On the other hand, the very same words 'payable on demand' have a different meaning in Article 22 which provides that for money deposited under an agreement that it shall be payable on demand, the period of limitation (3 years) will begin to run when the demand is made. Thus, the words 'payable on demand' have been given different meaning when applied with reference to 'money lent' and 'money deposited'. In the context of Article 21, the meaning and effect of those words is 'always payable' or payable from the moment when the loan is made, whereas in the context of Article 22, the meaning is 'payable when actually a demand for payment is made'.

[43] On the issue of when were the TT funds supposed to be repaid to Borneo Marble, we have reproduced in para 26 above the learned judge's finding at para 26 of his grounds of judgment that there was an implied agreement that the monies must be repaid by Datuk Yong when demanded by Borneo Marble.

[44] Such being the trial court's finding of fact and having regard to the decision of the Privy Council in *Md Akbar Khan,* we accepted Borneo Marble's argument that the transfer of the TT funds falls under item 42 of the Schedule to the SLO and not under item 41 as held by the learned trial judge. Therefore the limitation period only began to run upon actual demand for repayment by Borneo Marble, which was in 2014.

[45] With due respect to the learned judge, given the factual matrix of the case, we were unable to accede to his finding that it is item 41 and not item 42 of the Schedule to the SLO that governed the transfer of the TT funds to Datuk Yong and Datin Stella.

[46] Whether the transfer was a 'loan', an 'advance', or a 'deposit' is not to be determined by how the parties described the transfer. As the Privy Council said in *Md Akbar Khan*, a 'deposit' can also be a 'loan' (and vice versa), with the key distinguishing factor being when were the funds to be repaid, whether forthwith without actual demand with the transferee having to seek out the transferor, or only upon actual demand.

[47] In the present case, Datuk Yong denied that the TT funds were 'deposited' but conceded that the funds were 'placed' in his HSBC UK account, which was another way of saying that they were deposited into that account.

[48] It was strenuously argued by learned counsel for Datuk Yong and Datin Stella that the monies were loans and therefore caught by item 39 of the Schedule to the SLO which prescribes a limitation period of three years from the time the monies were lent. Reference was made to the following observations by the learned trial judge:

> [36] In the instant case, the remittances to the UK HSBC account of the defendants were made between 26 May 2006 and 14 September 2012. The instant action was instituted on 2 October 2015. In the premises, the claim for return of the remittances would be barred by limitation law if the said remittances constituted a loan from the plaintiff to the defendants. However, if the remittances constituted a 'deposit under agreement', under item 42 of the Sabah Limitation Ordinance (Cap 72) the three-year limitation period would only run from the time the demand was made and thus the action for return of the monies remitted to the HSBC account of the defendants would not be statute barred.

[49] It was submitted that on the facts of the case, the monies paid were gifts and were neither loans, advance nor deposits and were not intended by the parties to be repaid. It was further submitted that in any event no evidence was laid by Borneo Marble of any communication, negotiation or discussion between Borneo Marble and Datuk Yong, nor was any term of the agreement set out or given in evidence by Borneo Marble. According to learned counsel, it remained a bare assertion devoid of any evidence either by way of testimony or other documentary evidence.

[50] With due respect to learned counsel, we found no substance to the argument. At the risk of being repetitive, it needs to be reiterated that the learned trial judge had made a finding of fact that the monies were not personal and voluntary gifts from Paul Yong to Datuk Yong but were monies transmitted to Datuk Yong's and Datin Stella's HSBC UK account upon an implied agreement that they were to be repaid when demanded by Borneo Marble, which finding was not challenged by way of an appeal.

[51] In any event, it was not Datuk Yong's and Datin Stella's case that the finding was perverse or was plainly wrong, in the sense that no reasonable tribunal properly appraised of the facts and the law would come to the finding that the learned trial judge arrived at. In our view, on the evidence before him, the learned trial judge was perfectly entitled to come to such finding of fact.

[52] It was for all the reasons aforesaid that we allowed the parties' respective appeals to the extent that we mentioned.

Appeals allowed in part.

Reported by Kamarul Anwar